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In the Supreme Court of the United States

OCTOBER TERM, 1929

GEO. C. HOPKINS, COLLECTOR OF INTERNAL REVENUE, PETITIONER

v.

C. W. BACON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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v.

C. W. BACON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Attorney General, on behalf of Geo. C. Hopkins, Collector of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, entered in the above-entitled case on February 28, 1930, affirming the decision of the United States District Court for the Northern District of Texas.

QUESTION PRESENTED

Whether a husband domiciled in the State of Texas may properly be required to report in his separate income-tax return for 1927 the entire com-

munity income of himself and his wife; or, to state it another way, whether the wife has such an interest in the community income that she has a right to report one-half of such income in her separate return.

STATEMENT

The respondent married in 1894 and ever since has resided with his wife in the State of Texas. (R. 13.)

During 1927 and prior thereto the wife owned separate property consisting of shares of stock of two Texas corporations and a promissory note for $500. All other property owned by them prior to and during the year 1927 was their community property, title to which was in the respondent's name. Such property consisted of real estate located in Texas, shares of stock in Texas corporations, interests in oil, gas, and other minerals in Texas lands, and promissory notes. (R. 13–14.)

During the year 1927 the respondent and his wife received income from the separate property of the wife, income from community property, and compensation for respondent's services. (R. 14–15, 21–22.)

The respondent and his wife filed separate income-tax returns for 1927, in which each reported one-half of the community income and claimed one-half of the deductions to which they were entitled with reference to community property. (R. 15, 22–23.)

Upon review and audit of these returns the Commissioner of Internal Revenue determined that the entire income should have been reported by the respondent, that all the deductions should have been taken by him, and that his tax should be computed upon this basis and assessed against and paid by him. Accordingly, an additional assessment of $1,951.88 was duly made against the respondent and was paid by him to the petitioner as Collector of Internal Revenue for the Second District of Texas, together with $23.69 interest, making a total payment of $1,975.57, for the recovery of which this suit is brought. (R. 15–16.)

The District Court entered judgment for the respondent. (R. 57–58.) Upon appeal the Circuit Court of Appeals for the Fifth Circuit affirmed the decision of the lower court. (R. 68.)

STATUTES INVOLVED

The Revenue Act of 1926, c. 27, 44 Stat. 9, 21–22, 37, 130, provides, in part, as follows:

> SEC. 210. (a) In lieu of the tax imposed by section 210 of the Revenue Act of 1924, there shall be levied, collected, and paid for each taxable year upon the net income of every individual (except as provided in subdivision (b) of this section) a normal tax of 5 per centum of the amount of the net income in excess of the credits provided in section 216, except that in the case of a citizen or resident of the United States the rate upon the first $4,000 of such excess amount shall

be 1½ per centum, and upon the next $4,000 of such excess amount shall be 3 per centum; * * *. (U. S. C. App., Title 26, Sec. 951.)

SEC. 211. (a) In lieu of the tax imposed by section 211 of the Revenue Act of 1924, but in addition to the normal tax imposed by section 210 of this Act, there shall be levied, collected, and paid for each taxable year upon the net income of every individual a surtax as follows: * * *. (U. S. C. App., Title 26, Sec. 952.)

SEC. 223. (a) The following individuals shall each make under oath a return stating specifically the items of his gross income and the deductions and credits allowed under this title—

(1) Every individual having a net income for the taxable year of $1,500 or over, if single, or if married and not living with husband or wife;

(2) Every individual having a net income for the taxable year of $3,500 or over, if married and living with husband or wife; and

(3) Every individual having a gross income for the taxable year of $5,000 or over, regardless of the amount of his net income.

(b) If a husband and wife living together have an aggregate net income for the taxable year of $3,500 or over, or an aggregate gross income for such year of $5,000 or over—

(1) Each shall make such a return, or

(2) The income of each shall be included in a single joint return, in which case the

tax shall be computed on the aggregate income.

(c) If the taxpayer is unable to make his own return, the return shall be made by a duly authorized agent or by the guardian or other person charged with the care of the person or property of such taxpayer. (U. S. C. App., Title 26, Sec. 964.)

SEC. 1212. Income for any period before January 1, 1925, of a marital community in the income of which the wife has a vested interest as distinguished from an expectancy, shall be held to be correctly returned if returned by the spouse to whom the income belonged under the State law applicable to such marital community for such period. Any spouse who elected so to return such income shall not be entitled to any credit or refund on the ground that such income should have been returned by the other spouse. (U. S. C. App., Title 26, Sec. 964a.)

The applicable provisions of the Texas Constitution and Statutes will not be quoted. The principal provisions, however, are to be found in Articles 4613–4627, Vol. I, Revised Civil Statutes of Texas, 1925.

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred:

1. In not holding that under the laws and judicial decisions of the State of Texas the husband has such control over the community income that he should properly be required to report all of such income in his Federal income-tax return for 1927.

2. In holding that the wife has such an interest in the community income that she and her husband are permitted to divide the community income between them in separate returns.

REASONS FOR GRANTING THE WRIT

This is a test case upon the decision of which the taxability of income derived from community property defined and held under the laws of Texas will depend.

Burns Poe, Collector of Internal Revenue for the District of Washington, v. *H. G. Seaborn* (No. 492 on the Docket of this Court for the present Term), a case brought here on certificate from the Circuit Court of Appeals for the Ninth Circuit, concerns the taxability of income derived from community property in the State of Washington. In *Jacob O. Bender, Collector of Internal Revenue, Petitioner,* v. *William Pfaff* a petition is filed coincidentally herewith for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment of that court determining that the husband may not be required to pay an income tax upon more than half the entire net income derived from community property in Louisiana. The instant case presents similar questions with reference to taxation of income derived from community property in Texas. In all three of these cases the taxes in dispute were assessed in accordance with *35 Ops. Atty. Gen. 265,* and they are all test cases brought to determine

the applicability to the taxation of income from community property in Washington, Louisiana, and Texas of the principles established in *United States* v. *Robbins,* 269 U. S. 315, which dealt with the taxability of income derived from community property in California. While there are certain differences in the laws of these States which may be deemed to affect the husband's power of disposition and control over community property and income, the differences are not thought sufficient to warrant a conclusion different from that reached by this Court in the *Robbins case.*

Either the *Robbins case* is controlling, and the judgment below is erroneous, or the method of taxing income derived from community property defined and held under the laws of Texas is a question which has not been determined by this Court. Because of the importance of this question as affecting the revenue to be derived from taxation upon the income of all such property in the State of Texas, it is thought that the writ should issue, to the end that there may be an authoritative decision of this Court upon the questions involved.

Wherefore it is respectfully submitted that the petition should be granted.

THOMAS D. THACHER,
Solicitor General.

APRIL, 1930.

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